(2)

Supreme Court, U.S.
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No. 98-1982

IN THE

Supreme Court of the United States

October Term, 1998

KENNETH S. G. LEE

Petitioner

v.

STATE OF HAWAII

On Petition For Writ Of Certiorari
To The Supreme Court Of The State of Hawaii

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

This Supplemental Brief provides additional authorities supplementing Petition for Writ Of Certiorari No. 98-1982 filed June 7, 1999, "Petition". Authorities are for the REASONS section.

SUPPLEMENTAL REASONS FOR GRANTING A WRIT

This is for Petition section "Reasons", at pages 5-13. This section shows the federal question presented to the Lower Court. This is by Petitioner's Opening Brief filed March 2, 1998, Reply Brief filed April 27, 1998, supplemental authority lists filed December 22, 1998 and January 22, 1999 and Motion For Reconsideration filed February 24, 1999. Argument based upon material provided by this Brief may include references to or quotations from material cited earlier, as appropriate.

On June 7, 1839 Kauikeaouli, the Sovereign, proclaimed a Declaration of Rights, "1839 Declaration" for the native Hawaiian people. The entire text of the 1839 Declaration is included as Appendix A. The source of the text is Thurston, Fundamental Law of Hawaii "Fundamental Law". On October 8, 1840, the same Sovereign promulgated the 1840 Kingdom of Hawaii Constitution, "1840 Constitution". Fundamental Law, supra, at page 2. This citation supplements and completes the citation for item 1 Reasons section, page 5.

The 1839 Declaration is a statement of the principles of the ancient Taboo. The preface to the Laws of 1842 at page vii, Fundamental Law, supra, states, in part:

> "At these Islands, as well as in more civilized countries, there is something like a system of common law, independent of special stature. It consists partly in their ancient taboos, and partly in the practices of the celebrated chiefs as the history of them has been handed down by tradition,..."

Compiler John Ricord's preface to Vol. 1 of the Statute Laws of 1845-46 describes the Hawaiian Law system prior to and after the 1839 Declaration and 1840 constitution. Ricord at page 3 of the preface states:

> "The Hawaiian kingdom was governed until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments. The bill of rights, proposed and signed by His Majesty on the 7th of June, 1839, was the first essential departure from the ancient despotism. The Constitution which he voluntarily conferred on the people on the 8th of October, A.D. 1840, recognized the three grand divisions of a civilized monarchy, king, legislature and judges, and defined in some respects the general duties of each. These however, were so engrafted on the ancient form of government that there seemed to be a blending of their separate functions, requiring the aid of organic acts, limiting their usual spheres, in order to secure the civil liberties intended to be conferred upon the people. The Constitution had not been carried into full effect. Its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective."

A compilation of all Hawaiian Constitutions and early laws by Lorrin A Thurston was published in 1904 as the Fundamental Law of Hawaii. The Preface, at page iii, states:

> "Congress has expressly enacted a law organizing Hawaii into a Territory, and extended the provisions of the United States Constitution to the Territory. In a restricted sense, therefore, the United States Constitution and the Organic Act constitute Hawaii's fundamental law; but the Organic Act specifically re-enacts the great body of pre-existing Hawaiian statute law, which was based upon the several

> Hawaiian Constitutions and organic laws. A large proportion of the law governing real estate, property and personal rights, in Hawaii, being based upon these early constitutions and laws; and precedents, decisions and court practice having grown out of them, it is necessary to consult them in order to have a comprehensive understanding of existing Hawaiian law. They are nearly all published, however, in books now out of print and in scattered volumes, inaccessible to many and inconveniently located for all. In fact, not even practicing lawyers in Hawaii can, except at considerable loss of time, place their hands on the laws and constitutions necessary for the study and decision of practical questions continually being presented to them."

The 1840 Constitution marks the contemporaneous end of the Absolute Sovereign with unlimited powers and the commencement of the era of the Constitutional Monarch. To complete the constitutional structure contemplated by the 1840 constitution, implementing laws are enacted that lead to the Constitution of 1852, the verbatim text of which is included as Appendix C.

This citation supplements and corrects petition item 14 (c) at page 10 and the citation in the table of authorities at page iv: IN THE MATTER OF THE APPLICATION OF ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T.K. PARKER, A MINOR, FOR A WRIT OF PROHIBITION AGAINST THE HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, AT CHAMBERS, AND J.S. LOW, NEXT FRIEND OF ANNIE T.K. PARKER, A MINOR., " 16 Haw. 242 (1904); 16 Haw. 259(1904); 16 Haw. 412(1904); "Application of Carter". The entire text of "Application of Carter" is included as Appendix D. The Territorial Supreme Court in Application of Carter construes Sections 37 and 38 of Chapter 57 of the Laws of 1892, and Sections 1343-1395 of the Civil Code of 1859. The Laws of 1892 and the Civil

Code of 1859 are laws enacted by the legislature of the Kingdom of Hawaii and reenacted by the Territory of Hawaii in 1903. Carter v. Gear 197 U.S. 348, 353 (1904), "Carter v. Gear".

Application of Carter is about the jurisdiction of the judiciary. Petitioner notes for the attention of this court pages 248-250 of the opinion (page 6D-8D of Appendix D). The court, at page 245, (Appendix 3D) referring to a system of government already existing states that the Organic Act "manifests upon its face... an intention to continue that system except as changed". At pages 248-250 the court identifies and describes the system of government. The court then describes the system of government. The court states, at page 248, (Appendix 6D) "...what may be considered Hawaiian common law-that has grown up without the aid of statutes or has been built upon statutes..." Also at page 248, referring to the common law reference above "This began long before the first Constitution of 1840,..." The court then describes constitutions subsequent to 1840, at pages 249-250 (Appendix 7D) The constitution of 1852 "... has been the basis of all subsequent constitutions." The court then notes that the Constitution of 1864 mostly copied that of 1852 and that the Constitution of 1887 was copied mostly from that of 1864. At page 250 (Appendix 8D) the court recognizes a time period of "...sixty four years of organized constitutional government in Hawaii..." or from the 1840 Constitution to the date of the opinion.

Petitioner states that the opinion of the lower court, conflicts with the court's opinion in Application of Carter.

Petitioner has relied upon and cited Section 5 of Chapter 57, Laws of 1892. Paragraph 4) of the Reasons section of the Petition at pages 5 and 6 is a verbatim quote of Section 5. Petitioner has also cited the Chapter 57 Sec. 5, provision as adopted by the State of Hawaii in paragraph 7) of the Petition at page 8.

Petitioner also relies upon and cites section 14, Chapter III of the Civil Code of 1859, as follows:

"Section 14. The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries."

The above supplements items 2) and 3) of the REASONS section of the Petition at page 6. Supplementing paragraph 1 through 7 at pages 5 to 8, Petitioner cites the verbatim text of Application of Carter.

THE 1840 CONSTITUTION: A RIGHT OF REDRESS

Petitioner relies upon Article III of the 1840 Constitution and Article 4 of the Constitution of 1852. (See King's speech at the opening of the legislature, 1852 Appendix B.) Article III is quoted by numbered paragraph 1) at pages 5 and 6 of the Petition. By its terms Article III is self executing. Redress is granted by the king. This is an Absolute Grant. Damon v. Hawaii 194 U.S. 154, 158 (1904) "Damon". As the organization of the government continues, both the legislature and the judiciary are equally obligated to give redress, to provide a remedy in accordance with the further terms of Article III.

Supplementing petition paragraph 1) above, Petitioner cites for this court's attention Skelly Oil Co. et at. v. Universal Oil Products Co., 86 N.E. 2d 875 (1949), "Skelly". The Illinois court in Skelly relied upon the State Constitution of 1870, Art. II, Sec. 19, Smith-Hurd Stats, as follows:

"Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to

obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay"

Skelly is a fraud case and the court, at page 878 ruled:

"This is a clear mandate to the courts, that wherever the legislature has failed to provide a remedy, the courts must. This constitutional protection should be here invoked, especially where the legislature has not provided a remedy. Courts should not be helpless to find a remedy for a fraud of the instant type. If the statute fails to provide a remedy, the court can, as it has in many instances under the common law and equitable principles. In the cases of fraud and deceit the remedy is generally provided for by the courts, not by statute. It is perfectly clear that the Constitution had not in mind only remedies created by legislative enactment."

The court in Application of Carter referring to jurisdiction states "the jurisdiction so conferred has as a rule been of an equitable as distinguished from a legal nature such as was formerly exercised in England by the equity ecclesiastical and admiralty courts." .

By paragraphs 2) and 3) at page 6 of the Reasons section of the Petition, Petitioner has identified legislation and a judicial decision at the time the right of redress is vested. These statements are made strictly in a constitutional law sense and are not meant to preclude the immediate vesting of the granted rights. The opinion of the court in Application of Carter identifies Governor's Courts existing in 1840. Records of proceedings of the Governor's Courts are not readily available to Petitioner. In 1840 the legislature and the judiciary as contemplated by the Constitution of 1840 are yet to be established. Petitioner has identified the earliest legislative and judicial action known to him.

Supplementing Petition Reasons items 1 through 5, and 7, pages 5 through 8, Petitioner cites to the court's attention, B.E. Biggs et al. v. Roy H. Beeler, Attorney General et al., 178 SW (2d) 144, 946, (1943), 153 ALR 510., "Biggs". The constitutional question before the Tennessee court is the effect of a repeal of a poll tax statute enacted to implement a non self executing constitutional provision requiring a poll tax. The court, at page 516 (ALR) in its ruling invalidating the legislative repeal, states:

> "This constitutional mandate has been so "welded into intimate and permanent union" (Webster) with the statute that the two have become one and indivisible, and the statute may not now be divorced and destroyed. The necessary effect would be to nullify and defeat operation of the constitutional mandate also."

The opinion of the lower court conflicts with Biggs. The court in Biggs invalidated the repeal of a statute based upon a constitutional provision.

Petitioner cites to the court's attention HRS Sec 431-10C-306, item 8) at page 8 of the Petition. This no-fault provision infringes upon the rights of Native Hawaiians, and Hawaiian citizens such as petitioner Rice, infra. A Hawaiian citizen will have redress rights.

Petitioner states to this court that Biggs may support the right to vote asserted by Mr. Harold Rice, "Rice", petitioner in U.S. Supreme Court docket No. 98-818. Petitioner is of Hawaiian ancestry. Petitioner Rice has made a claim based upon Hawaiian citizenship. Petitioner asserts his own claim of Hawaiian citizenship although petitioner has voted in elections limited to people of Hawaiian ancestry.

Petitioner also identifies Art. 78 of the Hawaiian Constitution of 1852 as a possible basis for Mr. Rice's claim. Article 78 does not limit the right to vote to people of Hawaiian ancestry. Petitioner also cites Ch. 57, Section 5,

Laws of 1892 in support of Mr. Rice, Petition item 4) at page 6 and for comparison HRS 1-1, Petition item 7) at page 8.

Also in support of Mr. Rice, Petitioner cites for the court Public Access Shoreline Hawaii v. Hawaii County Planning Commission 79 Haw. 425 (1995), "PASH", and this express holding at page 449.

> "Customary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States"

The PASH holding suggests that Mr. Rice may have voting rights in accordance with the endemic common law, "Hawaiian National Usage," Chapter 57, Section 5, Laws 1892 and today's HRS 1-1.

HRS 1-1 is based upon a constitutional provision. This the state has not challenged or disputed. There is also no dispute that the rule of law established by Kake v. Horton, 2 Haw. 209(1860), "Kake" is attributable to HRS 1-1. The court in Kake awarded damages to a widow for the wrongful death of her husband. The U.S. Circuit Court of Appeals, 9th Circuit, in the Schooner Robert Lewers v. Kekauoha, 114 Fed. 849, "Kekauoha", relying on Kake and Section 1109 of the Civil Laws of Hawaii affirmed the U.S. District Court's award of damages to a widow for the wrongful death of her husband on the basis that the Kake rule of law is still in force in the Territory of Hawaii. The Territorial Supreme Court in a proceeding determining the propriety of a trustee's investments according to common law rules, In re the Guardianship of Anna T.K. Parker 14 Haw. 347 (1902), "Guardianship" at page 351, expressly recognized the rule of law established by Kake as "... a part of the law of the Territory of Hawaii." Section 1109 is now designated HRS 1-1.

The opinion of the lower court conflicts with Kake, Kekauoha, and Guardianship.

Petitioner now relies upon Marbury v. Madison; 5 U.S. 137 (February 1803) "Marbury v. Madison", an American decision. The Kingdom laws of 1892 and HRS 1-1 expressly so provide. opinion of the lower court conflicts with Marbury v. Madison. Petitioner now address section C of the opinion of the lower court at Petition Appendix 22A-24A. The lower court's sole authority for its 1840 Constitution ruling is Ahlo v. Smith, 8 Haw. 420 (1892) "Ahlo", which reviews voting eligibility. The lower court does state that the holding in Ahlo is as to voting. Necessarily, the rule of law stated by Ahlo is limited to voting rights. The lower court has relied upon Ahlo for its constitutional "new beginning" holding. That court's reliance upon Ahlo is misplaced. That opinion assumes the statutory provisions petitioner relies upon are not Kingdom laws. That conflicts with the decision of this court in Carter v. Gear.

Locating authorities for the adoption of a constitution such as the 1959 Hawaii Constitution is similar to the Biggs case where the court at page 514 states in part "... learned counsel confess failure to find any reported case directly in point;..." Petitioner has found one authority only, a Tennessee case and two authorities cited therein, Washington County Election Commission v. City of Johnson City et al. 350 S.W. 2d 601, "Washington County". The appellate question is the effect of a 1953 amendment to the Tennessee Constitution which provided that a charter amendment may be proposed in a municipal election by charter commission chosen by the qualified voters of a home rule municipality, by a municipal election. The court held that the constitutional provision is self executing and as a part of its holding at page 604, states:

> "A Constitution is not the beginning of a community, nor does it originate and create institutions of government. Instead, it assumes the existence of an established system which is to continue in force, and is based on pre-existing rights, laws, and modes of

thought. 11 Am:Jur., Constitutional Law, sec. 7, page 607; Stratton Claimants v. Morris Claimants (1890), 89 Tenn. 497, 512, 15 S.W. 87, 12 L.R.A.70.

Indeed, the Constitution of Tennessee gives emphatic expression to this assumption. It provides (Art. 11, sec. 1):

> "Section 1. Existing laws not affected by this Constitution.-All laws and ordinances not in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire or be altered or repealed by the Legislature; but ordinances contained in any former Constitution or schedule thereto hereby abrogated.""

The relevant provision of the Constitution of the State of Hawaii upon its admission states:

> "Transitional Provisions: Continuity of Laws, Section 2. All laws in force at the time this constitution takes effect and not inconsistent therewith, including, among others, acts of the Congress relating to the lands in the possession, use and control of the Territory of Hawaii, shall be the laws of the State and remain in force, mutatis mutandis, until they expire by their own limitation, or are altered or repealed by the legislature."

The opinion of the lower court conflicts with Washington County and necessarily with the analogous, more emphatic transitional provisions of the Hawaii State Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges his Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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August 21, 1999

Appendix A

THE FIRST CONSTITUTION OF HAWAII
Granted by Kamehameha III. October 8, 1840.

DECLARATION OF RIGHTS, BOTH OF THE PEOPLE AND CHIEFS.

"God hath made of one blood all nations of men to dwell on the earth," in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.

These are some of the rights which He has given alike to every man and every chief of correct deportment; life, limb, liberty, freedom from oppression; the earnings of his land and the protection of his mind, not however to those who act in violation of the laws.

God has also established government, and rule for the purpose of peace; but in making laws for the nation it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man, in a manner which is at variance with the above sentiments.

PROTECTION FOR THE PEOPLE DECLARED.

The above sentiments are hereby published for the purpose of protecting alike, both the people and the chiefs of all these islands, while they maintain a correct deportment; that no chief may be able to oppress any subject, but that chiefs and people may enjoy the same protection, under one and the same law.

Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws. Whatever chief shall act perseveringly in violation of this constitution, shall no longer remain a chief of the

Hawaiian Islands, and the same shall be true of the Governors, officers, and all land agents.

But if any one who is deposed shall change his course, and regulate his conduct by law, it shall then be in the power of the chief to reinstate him in the place he occupied previous to his being deposed.

Appendix B

Publication No. 1 Archives of Hawaii

ROSTER
LEGISLATURES OF HAWAII
1841-1918

CONSTITUTIONS OF MONARCHY AND REPUBLIC

SPEECHES OF SOVEREIGNS AND PRESIDENT

Compiled from the official records
by
Robert C. Lydecker Librarian, Public Archives

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Honolulu:
The Hawaiian Gazette Co., Ltd.
1918

KING'S SPEECH AT THE OPENING OF THE LEGISLATURE 1852.

Nobles and Representatives:

I am pleased again to meet you, here assembled, to advise with me respecting the welfare of the people whom God has committed to my charge.

My relations with all foreign nations, excepting only France, continue to be of the most friendly character.

I have not yet heard from the President of the French Republic, on the important matters which I referred to him. My government continues to protect French citizens and their interests as they do those of the most favoured nations.

The last session was brief, and the Legislature had much to do; it will be for you to consider whether all questions submitted to them were discussed with due deliberation, and especially those to which I specially called their attention.

A new Treaty with Great Britain was concluded on the 10th of July last, the ratification of which, by Her Britannic Majesty, is soon expected to arrive.

I have empowered my Commissioner at the Court of St. James to negotiate a similar treaty with the Representatives, there, of the King of Belgium.

An Act, offering to reciprocate with the United States in the admission, duty free, of certain articles, specially named, in the ports of the two countries, will be submitted for your sanction. The same special exemptions will extend to all other nations which offer the same special considerations.

A Treaty was concluded with the Republic of Bremen, on the 7th of August, 1851. Its ratification may be soon expected.

The peace of my Kingdom has been threatened with an invasion of private adventurers from California. An appeal was made to the United States Commissioner, which, being promptly acted upon by Captain Gardner, of the United States ship Vandalia, tranquillized the public mind. I have taken

some measures to create a military force, in the training of which, Captain Gardner has been pleased to render important assistance. Such a force has been considered indispensable, to enable me to protect, efficiently, the lives and property of all who live under my dominion. It will be for you to provide the means of maintaining such a force permanently, so as that the very defencelessness of my Kingdom may not invite the evil disposed to invade it.

It is my anxious desire so to govern my subjects as that no one can expect to benefit himself by any political change. With that view I voluntarily and freely granted the Constitution of 1840; and I am ready to grant another now, for the good of my people. It will be for you to consider whether the Constitution framed by a committee appointed last year, contains the principles necessary for the attainment of that end and the preservation of Monarchy on these Islands.

I have ordered my Ministers to lay before you their reports of the several Departments which I have committed to their care.

I rely upon you, the Representatives of my people, to vote the supplies necessary to carry on my Government, and to relieve my subjects, so far as possible, from all taxes that press hardly on the poor, or which cramp the industry of the country.

Appendix C

CONSTITUTION.

GRANTED BY HIS MAJESTY KAMEHAMEHA III., KING OF THE HAWAIIAN ISLANDS, BY AND WITH THE ADVICE AND CONSENT OF THE NOBLE AND REPRESENTATIVES OF THE PEOPLE IN LEGISLATIVE COUNCIL ASSEMBLED, JUNE 14th, 1852.

DECLARATION OF RIGHTS.

Art. 1. God hath created all men free and equal and endowed them with certain inalienable rights; among which are life and liberty, the right of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Art. 2. All men are free to worship God according to the dictates of their own consciences; but this sacred privilege hereby secured, shall not be so construed as to justify acts of licentiousness or practices inconsistent with the peace or safety of this Kingdom.

Art. 3. All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Art. 4. All men shall have the right, in an orderly and peaceable manner, to assemble, without arms, to consult upon the common good; give instructions to their Representatives; and to petition the King or the Legislature for a redress of grievances.

Art. 5. The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when, in cases of rebellion or invasion, the public safety shall require its suspension.

Art. 6. The right of trial by jury, in all cases in which it has been heretofore used in this Kingdom, shall remain inviolate forever.

Art. 7. No person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a court having jurisdiction of the case.

Art. 8. No person shall be held to answer for any crime or offense (except in cases of impeachment, or for offenses within the

jurisdiction of a police or district justice, or in summary proceedings for contempt), unless upon indictment, fully and plainly describing such crime or offense; and in the trial of any person on the charge of any crime or offense, he shall have the right to meet the witnesses who are produces against him, face to face, to produce witnesses and proofs in his own favor; and by himself, or his counsel, at his election, to examine the witnesses produced by himself, and cross-examine those produced against him; and to be fully heard in his defense.

Art. 9. No person shall be required to answer again for an offense, for which he has been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment.

Art. 10. No person shall be compelled, in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law.

Art. 11. No person shall sit as judge or juror, in any case in which his relative is interested, either as plaintiff, or defendant, or in the issue of which the said judge or juror may have, either directly or through a relative, any pecuniary interest.

Art. 12. Slavery shall, under no circumstances whatever, be tolerated in the Hawaiian Islands: whenever a slave shall enter Hawaiian territory he shall be free; no person who imports a slave, or slaves, into the King's dominions shall ever enjoy any civil or political rights in this realm; but involuntary servitude for the punishment of crime is allowable according to law.

Art 13. Every person has the right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and effects; and no warrants shall issue, but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the person or things to be seized.

Art. 14. The King conducts His Government for the common good; for the protection, safety, prosperity and happiness of His people; and not for the profit, honor, or private interest of any one man, family or class of men among His subject; Therefore in making laws for the nation, regard shall be had to the protection, interest and welfare not only of the King, the Chiefs, and rulers, but of all the people alike.

Art. 15. Each member of society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his

proportional share to the expense of this protection; to give his personal services, or an equivalent, when necessary; but no part of the property of any individual, can, with justice, be taken from him or applied to public uses without his own consent, or that of the King, the Nobles, and the Representatives of the people. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Art. 16. No subsidy, impost, duties or tax of any description, shall be established or levied, nor any money drawn from the public treasury under any pretext whatsoever, without the consent of both branches of the Legislature; provided that the Legislature shall make provision, in the annual bills of appropriation, for the emergency of war, invasion, or rebellion; and the Minister of Finance shall render a detailed account to the Legislature of any expenditure made under that provision.

Art. 17. All retrospective laws are unjust; therefore, no such laws shall ever be passed.

Art. 18. The Military shall always be subject to the laws of the land, and no soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by the Legislature.

Art. 19. All elections by the people shall be by ballot

Art. 20. Every elector shall be privileged from arrest on election days, during his attendance at election, and in going to and returning therefrom, except in cases of treason, felony, or breach of the peace.

Art. 21. No elector shall be so obliged to perform military duty, on the day of election, as to prevent his voting, except in time of war or public danger.

FORM OF GOVERNMENT.

Art. 22. The Government of the Kingdom is that of a Constitutional Monarchy, under His Majesty Kamehameha III, His Heirs, and successors.

OF POWERS.

Art. 23. The supreme power of the Kingdom, in its exercise, is divided into the Executive, Legislative and Judicial; these are to be

preserved distinct; the two last powers cannot be united in any one individual or body.

OF THE EXECUTIVE POWER.

SECTION 1. THE KING. HIS PREROGATIVES

Art. 24. The King shall continue to be the supreme Executive Magistrate of this Kingdom under the title of His Majesty.

Art 25. The crown is hereby permanently confirmed to His Majesty Kamehameha III. during his life, and to his successors. The successor shall be the person whom the King and the House of Nobles shall appoint and publicly proclaim as such, during the King's life; but should there be no such appointment and proclamation, then the successor shall be chosen by the House of Nobles and the House of Representatives in joint ballot.

Art. 26. No person shall ever sit upon the throne who has been convicted of any infamous crime, or who is insane or an idiot. No person shall ever succeed to the crown, unless he be a descendant of the aboriginal stock of Aliis.

Art 27. The King is Commander in Chief of the Army and Navy, and of all other Military forces of the Kingdom by sea and land; and has full power by himself, or by any officer or officers, he may appoint, to train and govern such forces, as he may judge best for the defense and safety of the Kingdom. But he shall never proclaim war without the consent of His Privy Council.

Art. 28. The King, by and with the advice of His Privy Council, has the power to grant reprieves and pardons, after conviction, for all offenses, except in cases of impeachment.

Art. 29. The King, by and with the advice of His Privy Council, convenes both Houses of the Legislature at the seat of Government, or at a different place, if that should become dangerous, from an enemy, or any dangerous disorder; and in case of disagreement between the two Houses, or between His Majesty and them, He adjourns, prorogues, or dissolves them, but not beyond the session of the next year; under any great emergency, He may convene both, or either of them to extraordinary sessions.

Art. 30. The King has the power, by and with the advice of His Privy Council, to make treaties, and appoint Ambassadors, other public Ministers and Consuls who shall be commissioned,

accredited and instructed agreeably to the usage and laws of nations.

Art. 31 It is His prerogative to receive and acknowledge ambassadors and other public ministers: to inform the Legislature by Royal message, from time to time, of the state of the Kingdom, and to recommend to their consideration such measures as he shall judge necessary and expedient.

Art. 32.. He has the power, by and with the advice of His Cabinet, and the approval of His Privy Council, to appoint and remove at His pleasure any of the several heads of the Executive Departments, and he may require information in writing from any of the officers in the Executive Departments, upon any subject relating to the duties of their respective offices.

Art. 33. It is his duty to see that the Treaties and Laws of the land are faithfully observed and executed.

Art. 34. The King has the power from time to time, to assemble His Cabinet or Privy Councillors to advice with him agreeably with the Constitution and Laws of the land.

Art. 35 The person of the King is inviolable and sacred; His Ministers are responsible; to the King belongs the Executive power; all laws that have passed both Houses of the Legislature, for their validity, shall be signed by His Majesty and the Kuhina Nui; all his other official acts shall be approved by the Privy Council, countersigned by the Kuhina Nui, and by the Minister to whose Department such act may belong.

Art. 36. The King is Sovereign of all the chiefs and of all of the People; the Kingdom is His.

Art. 37. All titles of honor, orders, and other distinctions emanate from the King.

Art. 38. The King coins money and regulates the currency by law.

Art. 39. The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can place the whole Kingdom, or any part of it under martial law; and he can ever alienate it, if indispensable to free it from the insult and oppression of any foreign power.

Art. 40. The King's Standard and the National Ensign are maintained as now established.

Art. 41. The King's private lands and other property are inviolable.

Art. 42. The King cannot be sued or held to account in any court or tribunal of the Realm

SECTION II.
OF THE KUHINA NUI.

Art. 43. The King appoints some chief of rank and ability to be his Kuhina Nui, who shall be styled the Kuhina Nui of the Hawaiian Islands, and whose title shall be Highness.

Art. 44. The Kuhina Nui shall be the King's special Counsellor in the great affairs of the Kingdom. All business connected with the special interests of the Kingdom, which the King wishes to transact, shall be dome by the Kuhina Nui under the authority of the King. All Acts, Royal Patents, Commissions, and other official documents, duly executed by the Kuhina Nui in the name and by the consent of the King, agreeably with article 35, unless specially excepted by law, shall be equally binding as if executed by the King himself.

Art. 45. All important business of the Kingdom which the King chooses to transact in person, he may do, but not without the approbation of the Kuhina Nui. The King and Kuhina Nui shall have a negative on each other's public acts.

Art. 46. The Kuhina Nui shall have charge of the Great Seal of the Kingdom, of the Royal Standard, and of the National Flag; and in the absence of the King, he shall preside over the deliberations of the Privy Council.

Art. 47. Whenever the throne shall become vacant by reason of the King's death, or otherwise, and during the minority of any heir to the throne, the Kuhina Nui, for the time being, shall, during such vacancy or minority, perform all the duties incumbent on the King, and shall have and exercise all the powers, which by this Constitution are vested in the King.

Art. 48. Whenever during the vacancy of the throne, or the minority of any heir to it, the office of Kuhina Nui shall become vacant by death, resignation, or otherwise, then the Privy Council, or the major part of them, shall, during such vacancy, have full power and authority to do, and execute all and every such acts, matters, and things, as the King or Kuhina Nui might or could, by virtue of this Constitution, do or execute. And in such case, the Privy council, immediately after the occurring of such vacancy,

shall cause a meeting of both Houses of the Legislature, who shall elect by joint ballot a person to fill the office of Kuhina Nui.

SECTION III. OF THE PRIVY COUNCIL.

Art. 49. There shall continue to be a Council of State for advising the King in the Executive part of the government, and in directing the affairs of the Kingdom, according to the Constitution and laws of the land, to be called *the King's Privy Council of State*.

Art. 50. The members of the Privy Council are appointed by the King, and hold their offices during His Majesty's pleasure. The King's Ministers and the Governors of the Islands are, ex-officio, members of His Privy Council. The Privy Council regulates its own proceedings by By-laws enacted by themselves and approved by the King.

SECTION IV. OF THE KING'S MINISTERS.

Art. 51. The Ministers of the King are appointed and commissioned by Him, and hold their offices during His Majesty's pleasure, subject to impeachment.

Art. 52. The King's Ministers constitute his Cabinet Council, and, as such, are his special advisers in the Executive affairs of the Kingdom.

Art. 53. Each of them shall keep an office at the seat of Government, be accountable for the conduct of his deputies and clerks; and grant information, so far as may consist with the King's honor and the good of the public service, to either House of the Legislature, or attend upon either in person, or by deputy, as such House shall determine.

Art. 54. Each of them shall make an annual report to the Legislature, made up to the first of January next preceding, of the transactions and business of his Department, within one week after the opening of the Legislature.

Art. 55. The King's Ministers hold seats in the House of Nobles; and they have the right to be heard in the House of Representatives, when accused of mal-administration in office.

SECTION V. OF THE GOVERNORS.

Art. 56. The King, by and with the advice of His Privy Council, appoints and commissions the Governors of his several Islands; the Governors hold office for the term of four years, subject to impeachment.

Art. 57. The King with the consent of the Governor, may appoint in one or more islands, a Lieutenant Governor, during His pleasure, to assist the Governor but always subordinate to him in authority.

Art. 58. The Governors, in case of sickness, or unavoidable absence, in all cases where no Lieutenant Governor has been appointed, have power to appoint substitutes, for all whose official acts they are responsible.

Art. 59. The Governors, subject to the King, shall have the executive control of their respective Islands, agreeably with the Constitution and laws of the land; and they shall have the command of the military forces of their respective Islands, and shall make an annual report of the administration of their respective Islands to the Minister of the Interior.

OF THE LEGISLATIVE POWER.

Art. 60. The Legislative Power of this Kingdom is vested in the King, the House of Nobles, and the House of Representatives; each of whom has a negative on the other.

Art. 61. The Legislative Body shall assemble annually, for the purpose of seeking the welfare of the nation, in the first week in April, and at such other time, and in the place that the King may judge necessary. This Body shall be styled the Legislature of the Hawaiian Islands.

Art. 62. Full power and authority are hereby given to said Legislature, from time to time, to make all manner of wholesome laws, either with penalties or without, as they shall judge to be for the welfare of the nation, and for the necessary support and defense of good government; provided the same be not repugnant or contrary to this Constitution.

Art. 63. No bill or resolution, although it may have passed the Legislature, shall become a law, or have force as such, until it shall have been presented to the King, through the Kuhina Nui, for his revisal, and if he approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return it with his objections in writing

to that House in which it shall have originated, who shall enter the objections at large on their journal, and no such bill shall be brought forward thereafter during the same session.

Art. 64. Each House shall be the judge of the qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Art. 65. Each House shall choose its own officers, and determine the rules of its own proceedings.

Art. 66. Each House shall have authority to punish by imprisonment, not exceeding thirty days, every person, not a member, who shall be guilty of disrespect to the House, by any disorderly or contemptuous behavior in its presence; or who during the time of its sitting, shall threaten harm to the body or estate of any of its members, for any thing said or done in the House, or who shall assault any of them therefor, or who shall assault or arrest any witness or other person ordered to attend the House, in his way going or returning; or who shall rescue any person arrested by order of the House.

Art. 67. Each House may punish its own members for disorderly behavior.

Art. 68. Each House shall keep a journal of its proceedings, and the yeas and nays of the members of either House, on any question, shall, at the desire of one fifth of those present, be entered on the journal.

Art. 69. The members of either House shall in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and they shall not be held to answer for any speech, or debate made in the House, in any other court or place whatsoever.

Art. 70. The Members of the House of Representatives shall receive, for their services a compensation to be ascertained by law and paid out of the public treasury, but no increase of compensation shall take effect during the year in which it shall have been made; and no law shall be passed, increasing the compensation of said members beyond the sum of three dollars per day.

Art. 71. The members of the House of Nobles sit without pay; but they may receive hereafter such a compensation as the law may enact.

OF THE HOUSE OF NOBLES

Art. 72. The King appoints the members of the House of Nobles, who hold their seats during life, subject to the provision of article 67; but their number shall not exceed thirty.

Art. 73. No person shall be eligible to a seat in the House of Nobles, who shall not have attained the age of twenty-one years and resided in the Kingdom five years.

Art. 74. The House of Nobles shall be a Court with full and sole authority to hear and determine all impeachments made by the House of Representatives, against any officer or officers of the Kingdom, for mis-conduct and mal-administration in their offices; but previous to the trial of every impeachment; the members shall respectively be sworn, truly and impartially to try and determine the charge in question, according to evidence and the law. Their judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place of honor, trust, or profit under this government; but the party so convicted shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.

OF THE HOUSE OF REPRESENTATIVES.

Art. 75. The House of Representatives shall be composed of not less than twenty-four nor more than forty members, who shall be elected annually.

Art. 76. The Representation of the people shall be based on the principle of equality, and shall be forever regulated and apportioned according to the population, to be ascertained by the official census. In the year one thousand eight hundred and fifty-three, and every sixth year thereafter, the number of Representatives shall be fixed by the Legislature agreeably with this and the preceding article.

Art. 77. No person shall be eligible for a Representative of the people, who is insane, or an idiot, or who shall at any time have been convicted of any infamous crime, nor unless he be a male subject or denizen of the Kingdom, who shall have arrived at the

full age of twenty-five years, who shall know how to read and write, who shall understand accounts, and who shall have resided in the Kingdom for at least one year immediately preceding his election.

Art. 78. Every male subject of His Majesty, whether native or naturalized, and every denizen of the Kingdom, who shall have paid his taxes, who shall have attained the full age of twenty years, and who shall have resided in the Kingdom for one year immediately preceding the time of election, shall be entitled to one vote for the representative or representatives, of the district in which he may have resided three months next preceding the day of election; provided that no insane person, nor any person who shall at any time have been convicted of any infamous crime, within this Kingdom, unless he shall have been pardoned by the King, and by the terms of such pardon been restored to all the rights of a subject, shall be allowed to vote.

Art. 79. All bills or resolves for raising the revenue, or calling for any expenditure of the public money, shall originate in the House of Representatives; but the House of Nobles may propose or concur with amendments as on other bills.

Art. 80. The House of Representatives shall be the grand inquest of the Kingdom; and all impeachments made by them shall be heard and tried by the House of Nobles.

OF THE JUDICIARY.

Art. 81. The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such inferior courts as the Legislature may from time to time establish.

Art. 82. The Supreme Court shall consist of a Chief Justice and two associate Justices, any of whom may hold the court. The Justices of the Supreme Court shall hold their offices during good behavior, subject to removal upon impeachment; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Provided, however, that any judge of the Supreme Court, or of any other Court of Record, may be removed from office for mental or physical inability by a concurrent resolution of two-third of both branches of the Legislature. The judge against whom the Legislature may be about to proceed, shall receive notice thereof, accompanied by a copy of

the causes alleged for his removal, at least twenty days before the day on which either branch of the Legislature shall act thereon.

Art. 83. The Kingdom shall be divided, by law, into a convenient number of circuits, not less than four, nor exceeding eight, subject to alteration by the Legislature, from time to time, as the public good may require; for each of which one or more Circuit Judges, not exceeding three, however, shall be appointed to hold their offices during good behavior, subject to removal upon impeachment.

Art. 84. The judicial power shall extend to all cases in Law and Equity, arising under the Constitution, any law of this Kingdom, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and Consuls, and to all cases of Admiralty and maritime jurisdiction.

Art. 85. The Judicial power shall be divided among the Supreme Court and the several inferior courts of the Kingdom in such manner as the Legislature may from time to time indicate.

Art. 86. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex-officio* President of the House of Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him, his decisions being subject, however, to the revision of the Supreme court, on appeal.

Art. 87. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties.

Art. 88. The King, His Ministers, the Governors, and each branch of the Legislature shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions.

Art. 89. The King, by and with the advice of His Privy council, appoints the Justices of the supreme court, and all other Judges of courts of Record; their salaries are fixed by law.

Art. 90. The governors, by and with the advice of the Justices of the supreme court, shall appoint the District Justices of their respective islands.

Art. 91. In order that the people may not suffer from long continuance in place of any District Justice, who shall fail of discharging the important duties of his office with ability and fidelity, all commissions of District Justices shall expire and

become void in the term of two years from their respective dates; and upon the expiration of any commission the same shall be renewed, or another person appointed, as shall most conduce to the well-being of the Kingdom. Provided always, that District Justices shall be subject to removal at any time by the Circuit Court of their respective islands, for causes particularly assigned by the judges of said Court in rendering their judgment. But no district justice shall be removed until he shall have notice of the charges made against him and an opportunity of being heard in his defense.

Art. 92. No Judge or Magistrate can sit alone on an appeal or new trial, in any case on which he may have given a previous judgment.

Art. 93. It shall be the duty of the Chief Justice to make an annual report, through the Minister of the Interior, to the Legislature, of the state of the Judiciary of the Kingdom in all its branches.

OF OATHS.

Art. 94. The King, after approving this Constitution, shall take the following oath:

I solemnly swear, in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity with that and the laws.

Art. 95. The Kuhina Nui shall take the same oath; and when exercising the Executive Power, during a minority, he shall take the following oath:

I solemnly swear, in the presence of Almighty God, to preserve the rights of the Heir to the Crown, and the Constitution whole and inviolate, and to govern in conformity with that and the law.

Art. 96. Every member of the House of Nobles shall take the following oath:

I most solemnly swear in the presence of Almighty god, that I will loyally support the Constitution and Laws of the Hawaiian Islands, and conscientiously and impartially discharge my duty as a member of this House.

Art. 97. Every member of the House of Representatives shall take the following oath:

I most solemnly swear in the presence of Almighty god, that I will faithfully support the Constitution and Laws of the Hawaiian Island

and conscientiously and impartially discharge my duties, as a Representative of the people.

GENERAL PROVISIONS.

Art. 98. No person shall ever hold a seat in the Legislature, or any office of honor, trust, or profit under the Government of the Hawaiian Islands, who shall in due course of law, have been convicted of theft, bribery, perjury, forgery, embezzlement, or other high crime or misdemeanor.

Art. 99. No officer of this Government shall hold any office, or receive any pension or salary, from any other government or power whatever.

Art. 100. The Legislature votes the appropriations for the year, after due consideration of the revenue and expenditure of the year preceding, and of the estimates of the revenue and expenditure for the current year, which shall be submitted to them by the Minister of Finance; all which accounts shall be appended to the bill of Appropriations and published annually.

Art. 101. The enacting style in making passing all Acts and Laws, shall be:-"Be it enacted by the King, the Nobles and the Representatives of the Hawaiian Islands in Legislative Council assembled."

Art. 102. To avoid improper influences which may result from intermixing in one and the same Act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

Art. 103. All laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by Legislature; such parts only excepted as are repugnant to this Constitution. All laws now enacted, or that may hereafter be enacted, contrary to this Constitution, shall be null and void.

Art. 104. This Constitution shall be in force from the first Monday of December in the year one thousand eight hundred and fifty-two; but that there may be no failure of justice, or danger to the Kingdom, from any change, all officers of this Kingdom, at the time this Constitution shall take effect, shall have, hold, and exercise all the powers to them granted, until other persons shall be appointed in their stead; and all courts of law shall proceed in the execution of the business of their respective departments; and all

executive and legislative officers, bodies and powers, shall continue in full force, in the enjoyment and exercise of their trusts, employments and authority, until new appointments or elections shall take place under this Constitution.

MODE OF AMENDING THE CONSTITUTION.

Art. 105. Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature, and if the same shall be agreed to by a majority of the members of each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the next Legislature; which proposed amendment or amendments shall be published for three months previous to the election of the next House of Representatives; and if, in the next Legislature, such proposed amendment or amendments, shall be agreed to by two-thirds of all the members of each house, and be approved by the King, such amendment or amendments shall become part of the Constitution of this Kingdom

KAMEHAMEHA.

Keoni Ana.

Appendix D

IN THE MATTER OF THE APPLICATION OF ALFRED W. CARTER, GUARDIAN OF THE PROPERTY OF ANNIE T.K. PARKER, A MINOR, FOR A WRIT OF PROHIBITION AGAINST THE HONORABLE GEORGE D. GEAR, SECOND JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, AT CHAMBERS, AND J.S. LOW, NEXT FRIEND OF ANNIE T.K. PARKER, A MINOR.

ORIGINAL.,

Argued October 20-21, 1904. Decided November 7, 1904.

Frear, C.J., Hatch, J., and Circuit Judge De Bolt in Place of Hartwell, J.

CIRCUIT JUDGES AT CHAMBERS-*independent jurisdiction in equity and probate matters, not impliedly repealed by Organic Act.*

The equity and probate jurisdiction of circuit judges at chambers existing under the Hawaiian constitution, which vested the judicial power in one supreme court and such inferior courts as the legislature might establish, was not impliedly repealed by the provision of the Organic Act which vested such power in one supreme court, circuit courts, and such inferior courts as the legislature might establish. Although the powers of judges at chambers are usually limited to matters incidental or ancillary to causes pending in court, judges at chambers, so-called, have in Hawaii not only such incidental powers but also independent jurisdiction in equity and probate matters. But such independent jurisdiction is exercised by such judges as courts of record, and not privately or summarily,-the phrase "circuit judge at chambers" being in such case merely a method of describing such courts.

CONSTUCTION-*rules of, applied.*

In construing a doubtful provision of an act, other provisions, the act as a whole, and reason and spirit, may be considered; also the circumstances under which it was adopted, the history which preceded it, and the consequences of proposed

construction; weight may be given to long continued, unquestioned and contemporaneous construction, if the provision is borrowed, the construction placed upon it previously may be considered; repeals by implication are not favored; *expressio unius est exclusion alterius.*

OPINION OF THE COURT BY FREAR, C.J.

This is an application for a writ of prohibition to restrain further proceedings in a matter instituted by the respondent J.S. Low, as next friend of Annie T.K. Parker, a minor, before the respondent the second judge of the circuit court of the first circuit, at chambers, for the removal of the petitioner as guardian of the property of the said Annie T.K. Parker. That matter was brought and is pending before the circuit judge at chambers under the provisions of Sections 37 and 38 of Chapter 57 of the Laws of 1892, commonly known as the Judiciary Act (C.L., Sections 1145, 1146), as amended by Sections 11 and 12 of Act 32 of the Laws of 1903; and also Sections 1343-1395 of the Civil Code 1859, (Civil Laws, Ch. 126), as amended by Act 16 of the Laws of 1903,-these being the principal provisions that purport, among other things, to confer and to some extent define the jurisdiction of circuit judges at chambers in guardianship matters. The contention is that these provisions are void as being in conflict with Section 81 of the Organic Act, which reads as follows:

"Sec. 81. That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided."

It is argued that this section vests all the judicial power of the Territory in certain courts and that therefore none can be vested by Hawaiian laws, whether old or new, in circuit judges at chambers; that the powers of a judge at chambers are limited to matters incidental or ancillary to causes pending in court and do not extend to the hearing and determination of matters of a judicial nature that are independent of any cause pending in court. A number of cases are cited in support of this view, particularly

Ballard v. Carr, 48 Cal. 70; *Risser v. Hoyt*, 53 Mich. 185; *Toledo A.A. & G.T. Ry. v. Dunlap*, 47 Mich. 456; *Rowe v Rowe*, 28 Mich. 353; *P. Ft. W. & C. K.. W. Co. v. Hurd*, 17 Oh. St. 1444; *State v. Woodson*, 161 Mo. 444; *McKnight v. James*, 1555 U.S. 685. These cases differ to a greater or less extent from the present case in the language of the constitutional and statutory provisions involved and the circumstances under which that provisions were adopted as well as under which those cases arose, and there are other cases that tend the other way; and yet the cases cited contain reasoning of great force in support of the petitioner's contention.

The present case, however, can not be decided solely as if there were a definite constitutional or organic provision intended to control the organization of a judicial system in the future where none existed previously, or to be chiefly declarative of a different system previously existing, or to introduce radical changes in a previously existing system. No doubt the Organic Act may be regarded as in the nature of a constitution from the standpoint of the Territory, and Hawaiian laws relating to the judiciary, whether previously existing or subsequently enacted, cannot stand if in conflict with the provisions of the act (see 23 Opt's. Att'y Gen'l. 539); and the circuit courts mentioned in Section 81 of that act may, perhaps, be regarded, from the territorial standpoint, as constitutional courts. See *Hind v. Wilder's S. Co.*, 14 Haw: 222; *Ex parte Smith*, 14 Haw. 269. Yet even a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction,-with a view to ascertaining the intention of its framers. This rule is especially applicable in the case of an act which, as in the case of the Organic Act now in question (a legislative act from the standpoint of the body that enacted it), contains many different provisions bearing upon the same subjects; which was enacted with reference to a highly developed system of government already existing; and which manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act. See particularly Sections 1, 6-10, 64, 68, 71-79, 81, 83, 91. Many other sections which do not on their face show a general intent to continue the Hawaiian laws in force were themselves taken in whole or in part from the Hawaiian Constitution of 1894, as, for

examples, Sections 11-54, 57-62, 80, 82, 84, 99. A striking illustration of the application of these rules of construction is found in the case of *Hawaii v. Mankichi*, 190 U.S. 197, in which the literal meaning of a provision of the Joint Resolution of annexation, which in a sense was the constitution of Hawaii for about two years, was held to be controlled by the general intent shown by the resolution as a whole, by the circumstances under which it was adopted, the past history of Hawaii and her judicial system, and the disastrous consequences that would result from a narrower construction. It is also a general rule of construction that when one state borrows a law from another state it also borrows the construction previously put upon it by the first state. Congress in the Organic Act not only adopted in general terms the laws of Hawaii, including those relative to the judiciary department, with certain exceptions (see 23 Ops. Att'y Gen'l, 539), but it borrowed the provisions of the Organic Act itself relative to the fundamentals of the judiciary mainly from the Hawaiian Constitution of 1894, which were also in the Hawaiian Constitutions of 1852, 1864 and 1887. Compare Sections 81, 82 and 84 of the Organic Act with Articles 82, 83 and 89 of the Constitution of 1894. The division of jurisdiction between courts and judges at chambers, so-called, has existed, without its validity being questioned, under all of these constitutions.

This is a question of construction. It is not inherently impossible to confer independent jurisdiction of cases not requiring trial by jury upon judges at chambers. That may be done by constitutional provision or by statute in the absence of constitutional restriction. See *Wilcox v. Wilcox*, 14 N.Y. 577; *Brewster v. Hartley*, 37 Cal. 15; *Stewart v. Daggy*, 13 Neb. 290. Nor would it seen inappropriate where, as in Hawaii, the jurisdiction so conferred has as a rule been of an equitable as distinguished from a legal nature-such as was formerly exercised in England by the equity, ecclesiastical and admiralty courts-and has been exercised with the formality and publicity usually obtaining in courts of law. The words "at chambers," indeed, may be used, and have been used here, in various senses. They may mean the judge's lodgings or private rooms or they may mean a room set apart, like an ordinary court room, for hearing matters without a jury. See *Com. v. McLaughlin*, 122 Mass. 449. Likewise, proceedings at chambers may imply a certain degree of informality; they may be more or less

summary and before a judge acting privately without a clerk; or, they may be formal, instituted by petition and process, with service of summons as in cases before courts of law, and heard in a public court room by the judge with clerk, bailiff, and all the elements that are usually supposed to make up a court of record. Even the word "court" is subject to more or less confusion. It is sometimes used to denote all that makes up the court, and sometimes to denote merely the presiding judge of the court. Again, in order to be a court, a body need not have a particular name. It may be designated a "circuit court" or it may simply be called a court with jurisdiction to hear and determine certain classes of cases. "District courts" and "district magistrates" are used interchangeably in our statutes to denote the same court. It is a court, though not of record. Commissioners of private ways and water rights under our statutes hold courts without names. A court is a political being. It is incorporeal. It may be described or designated in various ways-even without the use of the word "court" at all.

The words "court" and "chambers" have been used in various senses in Hawaii for more than half a century, but with recognized meanings, whether in statutes or judicial decisions, according to the circumstances. Powers at chambers of the incidental or ancillary sort have been conferred, but the words "at chambers" and other words deemed equivalent have also been used to signify certain distinctions in independent matters. The superior courts of record have borne different names from time to time, but superior jurisdiction has always been divided between the courts under their respective names and the judges of such courts at chambers. This has been a convenient way of indicating certain distinctions. The distinction is in general that between law and equity. The court, under its proper name, as, for instance, the "circuit court," sits at regular terms, with a jury, in law cases, which go to a higher court by bill of exceptions. The "circuit judge at chambers," or the "circuit judge," the "judge of a court of record at chambers," the "circuit court at chambers," the "probate court," the "probate judge at chambers," etc., as he is variously called, sits continuously, without a jury, in equity and probate, and formerly in admiralty and bankruptcy cases, which go to a higher court by general appeal. There is a court, without a proper name, of the circuit judge. It has often been referred to in both the statutes and judicial decisions as the court of equity or the court of probate, etc.

Moreover, it is a court of record, with clerk, bailiff, etc. It usually sits in the public court room of the circuit court. It sometimes sits in the judge's room or chambers adjoining, as a matter of convenience. The court also, as distinguished from the judge or the judge at chambers, has sat in the judge's chambers in matters not requiring a jury, or jury waived, or even with a jury, as a matter of convenience or necessity, though naturally not often, at least with a jury, for it is not convenient to have a jury in chambers. For the last twelve years cases could be brought to this court by writ of error as well as by appeal from circuit judges at chambers just as they may be brought by writ of error as well as by exceptions from circuit courts, and that is still the case.

The jurisdiction and procedure of the courts and the judges at chambers is not all defined by statute. Much of it is covered by statute only in a very general way. For instance, judges at chambers are given jurisdiction in equity in general terms-which means that they have such equitable jurisdiction as has been exercised in chancery in England and the equity courts in America. Even the act of 1878, which enumerates many subjects of equity jurisdiction, is not exclusive, although it was taken from the Massachusetts statute, which is there held exclusive. See *Dole v. Gear*, 14 Haw. 560. Similarly as to guardianship matters. See *Hoare v. Allen*, 13 Haw. 262. Much, as to jurisdiction and procedure, is governed by what may be considered Hawaiian common law,-that has grown up without the aid of statute or has been built upon statutes by inference and been recognized by bench and bar and has to some extent been assumed in the enactment of statues. In fact, the judiciary has developed here, especially in its earlier period, much as it did in early English history, gradually, and largely without the aid of statute. There was a gradual separation of judicial from executive and legislative functions, a gradual organization of a judicial system, introduction of trial by jury, separation of law and equity, separation of civil and criminal matters at law, and of equity, probate and admiralty matters at chambers, and of the functions of the judge and the jury, and a gradual development in forms of pleading and practice. This began long before the first constitution, that of 1840, the provisions of which were somewhat crude and meager and but little suggestive of the system, especially so far as the superior courts of record-the governors' courts-were concerned, that then existed and rapidly

developed for some years afterwards. Prior to the Constitution of 1840, there were scarcely any statutory provisions relative to the judiciary. After that until the act of 1847, organizing the judiciary, there was little more than the act of 1842 (Blue Book, p.170), which related chiefly to juries and began: "There are two distinct kinds of courts. One kind where the judges or tax officers decided the case by themselves, and the other kind where they can not act by themselves, but certain other persons must be associated with them. These persons who are associated with them shall constitute the jury." The first comprehensive act covering the judicial system with any degree of completeness was that of 1847. That is largely the basis, directly or indirectly, of all subsequent comprehensive acts relative to the judiciary. It divided jurisdiction between certain named courts and judges at chambers. Then came the Constitution of 1852, which has been the basis of all subsequent constitutions. It provided in Article 81: "The Judiciary Power of the Kingdom shall be vested in one Supreme Court, and in such inferior courts as the Legislature may from time to time establish." This was followed the next year by the second comprehensive judiciary act, drafted, we believe, by the same person who drafted the constitution, Chief Justice Lee. The main object of this act was to conform the laws to the change in the supreme court. The former supreme court, consisting of the king, premier and four chief, whose functions has practically ceased, was dropped altogether, and what had previously been the superior court of law and equity in name, but had already become practically the supreme court as well in reality, was made such in name also. This act also preserves the distinction between the courts and the judges at chambers, in matters of jurisdiction, procedure, methods of appeal, etc. Next came the Civil Code of 1859, embodying, in sections 815-1281, a codification of the laws relating to the judiciary, namely, the acts of 1847 and 1852, and a number of subsequent acts of minor importance, but preserving the distinction between the courts and the judges at chambers in language for the most part still in force in the statute books. The Constitution of 1864 followed, copying for the most part the provisions of that of 1852, including the provision now in question, which was Article 64 of the constitution. The Constitution of 1887 was copied mostly from that of 1864, and contains the same Article 64. Meanwhile a number of more or less important acts were passed more fully defining or altering in detail the jurisdiction and

procedure, that already for the most part existed, in regard to particular subjects. These are set forth in the compilations of 1884 and 1897, which were not enacted. The judiciary act of 1892 made some important changes in the organization of the judiciary and the jurisdiction of the courts but preserved the same distinction between the courts and the judges at chambers. The Constitution of 1894 copied the provisions of that of 1864 relating to the judiciary with some changes not material to the questions now under consideration. The provision now particularly in question appears as Article 82. In view of the fact that constitution after constitution and statute after state has been adopted by constitutional convention and legislatures and accepted without question by bench and bar and the public throughout the sixty-four years of organized constitutional government in Hawaii, recognizing the constitutionality and propriety of provisions such as those now called in question, coupled with the fact that the "judges at chambers" in the exercise of jurisdiction equity and probate matters are and have been regarded as courts, and not only that, but courts of record, it would be preposterous to hold that the statutes conferring or defining such jurisdiction of judges at chambers would be void under Hawaiian constitutions or immediately prior to the enactment of the Organic Act.

Under the constitutions of Hawaii, the courts of the circuit judges at chambers as well as the circuit courts, have been established by the legislatures as inferior courts, that is, inferior to the supreme court, in the exercise of the power to establish such courts under the constitutional provision in question. What the relation between a circuit court and the court of a circuit judge at chambers is, is an interesting question that was much argued in this case but need not be decided. In some jurisdictions law and equity are administered by distinct courts as well as by distinct forms of procedure; in others by the same courts thought by distinct forms of procedure; in still others by the same court through the same forms of procedure. Whether the circuit court and the court of the circuit judge at chambers should be regarded as one, that is, whether they should be considered merely as the law and equity sides of the same court, or whether they should be considered as distinct courts, though presided over by the same judges, is a question upon each side of which much can be said. Many statutory provisions as well as many decisions may be regarded as pointing in each direction and

yet are not necessarily inconsistent with either theory. Among the cases see *Kendall v. Holloway*, 16 Haw. 45; *Kala v Mills*, 15 Haw. 422; *Hind v. Wilder's S. Co.*, 14 Haw. 215, 223; *Silva v. Souza*, 14 Haw. 46; *Willard v. Vincent*, 13 Haw. 237; *Kona Coffee Co. v. Circuit Court*, 10 Haw. 571; *Est. of Metcalf*, 3 Haw. 614. A discussion of the numerous statutes and decisions would be too lengthy. Whether the court of the judge at chambers is the same as the circuit court or a different court, it is a court, and it is a court of record, and it and its predecessors have existed unquestioned for more than fifty years.

The question is not merely whether Congress intended by Section 81 of the Organic Act to prohibit the creation of such a court in the future but whether it intended to abrogate such courts already existing. That section is borrowed with modifications from the provision above quoted found in the last four Hawaiian constitutions, under which such courts must be held, under the rule of long continued and unquestioned as well as contemporary construction, not to mention other rules, to have been legally constituted. If no modifications had been made in this borrowed section, could we hesitate to hold that Congress did not intend that it should mean something so radically different from what it has been construed for half a century to mean, or that Congress did not intend by adopting the same provision to repeal by implication what had become so thoroughly established under it? Do the modifications require a different construction? The only modification in the main provision of this section consists in the insertion of the words "circuit courts." It is contended that this modification in itself shows an intention to introduce a change in the judicial system of Hawaii. That is not a necessary inference. If we could with propriety look to the reports in the Congressional Record of the reasons given for inserting these words by way of amendment on the floor of Congress, we should find it to be an erroneous inference. The insertion of these words would naturally, in view of the fact that there were already circuit courts here, be considered as preservative rather than destructive. Those words, of course, mean such circuit courts as were already here. Otherwise there would be nothing to indicate what their nature was to be, except that they should be "circuit" courts-which gives no clue to their jurisdiction as respects either subject matter or territory. The continuation of Hawaiian laws relative to the judiciary also show that the existing

circuit courts were meant. Congress did not define the jurisdiction of such courts except by reference to the laws of Hawaii. The apparent object of inserting the words "circuit courts" was to insure a continuance of those courts rather than the abrogation of other courts, and the reason why it was thought best to insert these words for the purpose may have been the possibility of doubt as to whether such courts, being courts of record of general jurisdiction, would be included under the words "inferior courts." Several reasons may easily be imagined as likely to suggest the advisability of inserting these words. In the nature of things there might be courts of circuit judges at chambers consistently with the presence of the words "circuit courts" in this provision, as well as there could be courts of judges at chamber under the original provision in the Hawaiian constitution, when there were courts of the justices of the supreme court at chambers, during the period when they had original as well as appellate jurisdiction, notwithstanding the words "supreme *court*" in the constitutional provision, or when there were courts of circuit judges at chambers notwithstanding the words "inferior *courts*." Indeed if we must infer an intention to make radical changes by the introduction of these words, we may as well infer that Congress meant "circuit" courts strictly speaking, that is, courts that travel about the circuit, and so to abrogated the existing circuit courts which had become fixed although they retained the name that they had years ago when they did travel.

But it is contended that the remainder of the section shows that a change was intended. This, to repeat it, reads as follows: "and until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." The argument is that "herein" refers to this section and not to the entire act and that , since the insertion of the words "circuit courts" is the only change made, the phrase "*except* as herein *otherwise* provided" must show that a change was intended in the classes of courts. It is clear, however, that "herein" refers to the entire act, and therefore, since a number of changes in the judiciary are made by other sections (e.g., Secs. 7, 83, 86), the phrase in question is fully explained be reference to them. "Herein" may refer to the act as well as to the section. It must be held to refer to the act or else this section would be in conflict with the other sections that make changes in the laws relative to the

judiciary. Moreover, the same phrase "except as herein otherwise provided" is found in other sections where it must refer to the whole act. See Secs. 5, 12, 35, 48.

The latter portion of Section 81, indeed, far from showing an intention to repeal, shows a general intention to continue in force the laws "heretofore in force concerning the several courts and their jurisdiction and procedure." But it is suggested that the laws conferring jurisdiction on judges at chambers were void under the Hawaiian constitutions also, and so were no "heretofore in force." This argument has already been practically disposed of. It is further argues that even if the old laws were continued in force, this would not affect the argument that the new laws, namely, the amendments of 1903, above referred to, were void. But (aside from the more reasonable view that future amendments might well be made as to details along lines consistent in principle with the old laws, and the fact that the amendments in question did not affect the old laws materially so far as the questions now before us are concerned), even if the new laws were void, the old laws would remain in force and they cover the ground. It is contended, however, on the other hand, that the old laws were to continue only "until the legislature shall otherwise provide," and that, since the legislature has otherwise provided, namely, in the amendments referred to, the old laws have ceased to be operative. But, as we have seen, the legislature has not otherwise provided except in certain particulars-which do not go to the extent of materially affecting the general jurisdiction of circuit judges in guardianship matters. Moreover, if the new laws are valid, they are sufficient in themselves without the old laws; while, if they are invalid, the legislature has not otherwise provided and the old laws remains and are sufficient in themselves.

Thus, not only is there nothing in Section 81 that requires us to hold that Congress intended, by the insertion of the words "circuit courts," to effect the important change contended for-a change by mere vague implication that would abrogate in toto the courts having equity and probate jurisdiction, but there is much in this section to indicate the contrary. This different intention is strongly sustained by other sections of the act. Section 83, for instance, shows a general intent in this direction by providing "that the laws of Hawaii relative to the judiciary department, including civil and criminal procedure, except as amended by this act, are

continued in force," etc., and then making certain specific changes, but not in respect to the jurisdiction or powers of judges at chambers. Section 7 expressly repeals many laws relating to the judiciary, such as that conferring upon circuit judges jurisdiction in bankruptcy. It even expressly repeals the "first subdivision of section eleven hundred and forty-five," (relating to admiralty jurisdiction) of the Civil Laws, -the section that is now in question and that defines in twelve subdivisions the jurisdiction of circuit judges at chambers, but does not mention the subdivisions that confer upon such judges equity and probate jurisdiction. *Expressio unius est exclusio alterius. Expressum facit cessre tacitum.*

Section 10, entitled "Construction of existing statute," provides "that all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed; *** all actions at law, *suits in equity, and other proceedings* then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the *corresponding courts* of the Territory of Hawaii." This permitted the retention by circuit judges at chambers of admiralty cases then pending, although all admiralty jurisdiction over new cases was transferred from them to the United States district court for Hawaii. *Ex p. Wilder's S. Co.*, 183 U. S. 545; *Wilder's S. Co. v. Hind*, 108 Fed. 113; *Hind v. Wilder's S. Co.*, 13 Haw. 174. It equally authorized the retention by circuit judges at chambers of jurisdiction in equity and probate matters then pending. Some such matters, especially in probate, might not be finally disposed of for several years, during all of which time the circuit judges at chambers would continue to exercise such jurisdiction. This, it is true, is in the nature of an interregnum clause. But it provides for the continuation of such suits and proceedings in the corresponding courts of the Territory, thus implying that there were to be such *corresponding* courts. It was a temporary provision for pending cases, not temporary for existing courts; it provided for the completion of all pending cases, whether of kinds the jurisdiction over which was to remain or be taken away,-but in the corresponding courts, which were to continue for new as well as for pending cases. It was not contemplated that such cases should be transferred from circuit judges at chambers to circuit courts; nor is there any indication of an intention to continue the court of the circuit judges at chambers temporarily only.

The permanent writ is denied and the temporary writ dissolved.

Ballou & Marx; Kinney, McClanahan & Cooper; and *Robertson & Wilder* for petitioner.

J.A. *Magoon* and J. *Lightfoot* for respondent.